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SUPREME COURT, U.S.

No. 05-853

IN THE

Supreme Court of the United States

JAMES M. McGOWAN, SR., Palm City, Florida,

Petitioner,

v.

NJR SERVICE CORPORATION and
NEW JERSEY NATURAL GAS COMPANY,
Wall Township, New Jersey,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the Third Circuit correctly rule that the administrator of an ERISA-qualified pension plan may not recognize a waiver contained in a non-QDRO state domestic relations order offered by a participant to change his designation of a plan beneficiary where such change is prohibited by the provisions of the plan?

2. Does the ruling of the Third Circuit Court of Appeals warrant review by this Court?

LIST OF PARTIES TO THE PROCEEDINGS

James M. McGowan, Sr., Palm City, Florida, Petitioner.

NJR Service Corporation and New Jersey Natural Gas Company, Wall Township, New Jersey, Respondents.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THIS CASE

The decision of the U.S. Court of Appeals for the Third Circuit is published as *McGowan v. NJR Service Corp.*, 423 F.3d 241 (3rd Cir. 2005). The decision of the U.S. District Court, District of New Jersey is unpublished. It is captioned as *McGowan v. New Jersey Natural Gas Co.*, Civ. A. No. 03-1035 (SRC) (July 23, 2004).

BASIS FOR U.S. SUPREME COURT JURISDICTION

The U.S. Court of Appeals for the Third Circuit ruled in favor of NJR Service Corp., et al., on September 13, 2005. McGowan petitioned for rehearing *en banc* on September 26, 2005. The Court of Appeals denied the petition on October 13, 2005. The United States Supreme Court is authorized to consider this case pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN CASE

29 U.S.C. § 1055(a):

> (a) Required contents for applicable plans
>
> Each pension plan to which this section applies shall provide that –
>
> (1) in the case of a vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant shall be provided in the form of a qualified joint and survivor annuity, and

(2) in the case of a vested participant who dies before the annuity starting date and who has a surviving spouse, a qualified preretirement survivor annuity shall be provided to the surviving spouse of such participant.

29 U.S.C. § 1056(d):

(d) Assignment or alienation of plan benefits

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

* * * *

(3)(A) Paragraph 1 shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

(B) For purposes of this paragraph –

(i) the term "qualified domestic relations order" means a domestic relations order –

(I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under the plan, and

(II) with respect to which the requirements of subparagraphs (C) and (D) are met,

* * * *

(C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies –

(i) the name and last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

(iii) the number of payments or period to which such order applies, and

(iv) each plan to which such order applies.

(D) A domestic relations order meets the requirements of this subparagraph only if such order –

(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

29 U.S.C. § 1103(c):

(1) Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), or under section 420 of Title 26 (as in effect on October 22, 2004), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

29 U.S.C. § 1104(a):

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and – (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

STATEMENT OF THE CASE

From May 12, 1969 to November 30, 1996, James M. McGowan, Sr. ("Plaintiff" or "McGowan") was employed by New Jersey Natural Gas Company ("the Company"). During his employment, Plaintiff accrued benefits under the New Jersey Natural Gas Company Plan For Retirement Allowances For Non-Represented Employees ("the Plan"). The Company was the Administrator of the Plan.

On August 1, 1996, shortly before his retirement, Plaintiff completed a beneficiary designation form, wherein he designated Rosemary Byrne McGowan (hereinafter referred to as "Ms. Byrne"), his wife at that time, as his beneficiary under the Plan.[1] On October 16, 1996, Plaintiff executed a form wherein he elected to receive his retirement benefit under the Plan in the form of the "Automatic Surviving Spouse Option," which is an annuity for his life, with a 50% survivor annuity payable to his spouse, Ms. Byrne, who happened to be Plaintiff's second wife. Under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, et seq. ("ERISA"), this form of retirement benefit is referred to as a "qualified joint and survivor annuity" or "QJSA". 29 U.S.C. § 1055. Following Plaintiff's retirement on December 1, 1996, Plaintiff's monthly Plan benefits commenced.

In 1998 Plaintiff contacted the Company's Manager of Benefits and Compensation and inquired as to whether he could change his beneficiary under the Plan. Plaintiff was advised that the terms of the Plan prohibited the designation

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1. Technically, Ms. Byrne was a "contingent participant" under the terms of the Plan.

of a new contingent beneficiary as his benefit payments had already commenced. Shortly thereafter, Plaintiff and Ms. Byrne executed a Marital Settlement Agreement dated July 23, 1998, in which Ms. Byrne "waive[d] any and all rights, title, interest or claims . . . to all bank accounts, life insurance policies and any right to the New Jersey Natural Gas Company Employee Pension Plan of [Plaintiff]." On July 27, 1998, Ms. Byrne executed a form wherein she consented to the naming of Shirley McGowan, Plaintiff's first wife, as Plaintiff's beneficiary under the Plan. On August 6, 1998, an attorney representing Mr. McGowan wrote to the Company reiterating McGowan's request to change his beneficiary under the Plan from Ms. Byrne to Shirley McGowan. The Company denied this request and Plaintiff did not pursue the matter further. Plaintiff subsequently was legally divorced from Ms. Byrne. The Final Judgment of Dissolution of Marriage dated May 24, 1999 incorporated by reference the Marital Settlement Agreement.

On November 3, 2001, Plaintiff married Donna McGowan (referred to herein as "the Current Wife") and again sought to change his designation of beneficiary—this time to make the Current Wife the beneficiary. The Company again informed Plaintiff that he could not change his beneficiary. The Plaintiff appealed. The Company's Benefits Administration Committee upheld the decision to deny Plaintiff's request to change his beneficiary.

On March 5, 2003, McGowan commenced the within action by filing a two-count Complaint against NJR Service Corporation in the U.S. District Court for the District of New Jersey. Only the first count, which sought declaratory relief in the form of an order directing the Company to designate

the Current Wife as Plaintiff's contingent beneficiary under the Plan, is the subject of this appeal.[2]

With no dispute existing as to any material fact, both parties moved for summary judgment. On July 23, 2004, the District Court issued its opinion and order denying Plaintiff's motion for summary judgment, granting the Company's cross-motion for summary judgment and dismissing Plaintiff's action. The District Court held that under ERISA, the Company was required to administer the pension plan strictly in accordance with the terms of the written plan documents and could not look to documents outside of the plan such as the Marital Settlement Agreement, which contained Ms. Byrne's purported waiver of her beneficiary rights. The District Court further ruled that under the express terms of the Plan, a participant may not change his or her contingent participant after benefits commence.

A three-judge panel of the U.S. Court of Appeals for the Third Circuit affirmed the District Court's ruling. *McGowan v. NJR Service Corp.*, 423 F.3d 241 (3rd Cir. 2005). The majority of the Court, relying in part upon guidance provided by this Court in *Boggs v. Boggs*, 510 U.S. 833, 117 S. Ct. 1754 (1997), held that the Plan Administrator was not required to recognize Ms. Byrne's waiver of her beneficiary interest under the Plan. Additionally, one member of the panel, Judge Becker, in a concurring opinion also affirmed on the same ground as the District Court's opinion, specifically that plan administrators may not look beyond the plan documents in connection with the administration of

2. On July 7, 2003, Plaintiff filed an Amended Complaint that is substantially the same as his original Complaint except that it correctly named New Jersey Natural Gas Company, the Administrator of the Plan, as the defendant.

an ERISA qualified plan, citing 29 U.S.C. § 1104(a)(1)(D). Judge Becker explained that a rule which permitted consideration of documents outside the plan would undermine one of the principle goals of ERISA that "plans be uniform in their interpretation and simple in their application," citing H.R. Report 93-533 (1974), 1974 U.S. Code Congressional and Administrative News 4639, 4650. One member of the panel, Judge Fuentes, dissented, finding that, under federal common law, waivers that are sufficiently specific may be recognized by plan administrators.

Plaintiff filed a petition for rehearing *en banc*. By Order dated October 13, 2005, the petition was denied.

REASONS FOR DENYING THE PETITION

PLAINTIFF'S PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED AS THIS COURT'S RULING IN *BOGGS v. BOGGS* CONTROLS THE OUTCOME OF THIS CASE AND INDICATES THAT THE MINORITY RULE IS CORRECT

Certiorari should be denied in this case because this Court in *Boggs v. Boggs* has already resolved the central issue in this case as to which the circuits are split, and the Third Circuit, following *Boggs*, correctly ruled in the case at bar. As Plaintiff pointed out in his Petition, the Circuit Courts of Appeals are split regarding the issue of whether plan administrators may recognize a waiver contained in a divorce decree as a basis for changing the participant's designation of a plan beneficiary. A so-called "majority rule" and "minority rule" have developed on the issue – under the majority rule, the courts look to federal common law to determine whether an external waiver is sufficiently specific

to be valid; under the minority rule, the courts require administrators to adhere strictly to plan documents and ignore external waivers except in limited circumstances specified in ERISA. *Compare Hill v. AT&T*, 125 F.3d 646, 650 (8th Cir. 1997); *Estate of Altobelli v. International Bus. Mach. Corp.*, 77 F.3d 78, 80 (4th Cir. 1996); *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321, 1326 (5th Cir. 1994), *cert. denied*, 513 U.S. 1081, 115 S. Ct. 732 (1995); *Fox Valley & Vicinity Constr. Workers Fund v. Brown*, 897 F.2d 275, 280 (7th Cir.) (en banc), *cert. denied*, 498 U.S. 820, 111 S. Ct. 67 (1990), *with Krishna v. Colgate Palmolive Co.*, 7 F.3d 11, 16 (2d Cir. 1993); and *McMillan v. Parrot*, 913 F.2d 310 (6th Cir. 1990).

However, this Court's decision in *Boggs v. Boggs* resolved the "split" among the circuits and clearly indicated that the minority rule is the correct one. Further, Circuit Courts considering this and similar issues since *Boggs* have relied upon it for guidance. *See, e.g., Branco v. UFCW-Northern California Employers Joint Pension Plan*, 279 F.3d 1154 (9th Cir. 2002); *Metropolitan Life Ins. Co. v. Pettit*, 164 F.3d 857 (4th Cir. 1998); *Mattei v. Mattei*, 126 F.3d 794 (6th Cir. 1997).[3]

In *Boggs*, this Court made three important pronouncements regarding ERISA that effectively decided the issues in the case at bar. First, this Court ruled that ERISA must be construed in the strictest possible manner and departures from the strict terms of the statute cannot be allowed. *Boggs*, 520 U.S. at 841. Second, this Court ruled that beneficiary status may be conferred on non-plan participants only in narrow circumstances, namely by way of a QJSA or a Qualified Domestic Relations Order

3. *But cf. Manning v. Hayes*, 212 F.3d 866, 872-74 (5th Cir. 2000) (continuing to follow majority rule in case involving life insurance proceeds, distinguishing *Boggs* on the basis that *Boggs* concerned an annuity in a community property state).

("QDRO"). *Id.* at 851. Finally, the Court ruled that the "principle objective" of ERISA is to protect plan participants and beneficiaries. *Id.* at 845. As will be explained more fully below, applying these principles in the context of the instant case demonstrates that a plan administrator may not recognize a waiver contained in a non-QDRO state domestic relations order, such as the divorce decree issued to Mr. McGowan and Ms. Byrne in Florida in 1999.

A. Under *Boggs*, ERISA must be construed in the strictest manner possible.

In *Boggs*, this Court acknowledged that ERISA is an intricate and comprehensive statute the provisions of which must be carefully followed and strictly construed. *Id.* at 841. This Court also instructed that ERISA was carefully and deliberately created by Congress to protect the economic security of surviving spouses, and its provisions must be strictly construed with that goal in mind.[4] *Id.* at 843.

1. Under *Boggs*, Plan Administrators are Bound by the Terms of the Plan

In the case at bar, it is undisputed that the Plan is an "employee pension benefit plan," *see* 29 U.S.C. § 1002(2), and is thus governed by ERISA's provisions. 29 U.S.C. § 1003. Under ERISA, "every employee benefit plan" must be "established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). In addition, ERISA

4. Of note, prior to *Boggs*, cases following the majority rule held that resorting to federal common law was proper because ERISA is silent as to what constitutes a valid waiver. *Boggs* shows that this rationale is flawed. ERISA is silent as to what constitutes a waiver because it prohibits plan administrators from looking at external documents other than a QDRO.

specifies the responsibilities that fiduciaries, such as the Company,[5] owe to plan participants and beneficiaries. In particular, ERISA requires that fiduciaries, in administering qualified plans, discharge their duties "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this [statute]." 29 U.S.C. § 1104(a)(1)(D). Thus, in light of this Court's instruction in *Boggs* that ERISA must be carefully followed and strictly construed, the Company is required to operate the Plan strictly in accordance with the terms of the Plan and may not exercise its discretion to administer the Plan in any other manner.

2. Based on *Boggs*, the Plan must follow the designation on the QJSA

ERISA requires the Plan to pay benefits to plan participants who are married on their annuity starting date in the form of a QJSA. 29 U.S.C. § 1055. A QJSA is defined as an annuity for the life of a married participant with a survivor annuity for the life of the spouse which is not less than 50% of (and is not greater than 100% of) the amount of the annuity which is payable during the joint lives of the participant and spouse. 29 U.S.C. § 1055(d); 26 U.S.C. § 417(b). In the case at bar, Plaintiff received his retirement benefit in the form of a QJSA. ERISA contains specific rules as to when and how a QJSA payable to a spouse can be waived and revoked (so that the spouse is no longer the contingent participant).

ERISA provides that a participant "may elect at any time during the applicable election period" to waive the QJSA

5. The Company is a fiduciary of the Plan due to its status as Plan Administrator. *See* 29 U.S.C. § 1002(21); the Plan Section 9.1.

form of benefit. 29 U.S.C. § 1055(c)(1). For purposes of the QJSA, the "applicable election period" is defined as the "90-day period **ending on the annuity starting date**." 29 U.S.C. § 1055(c)(7) (emphasis added).

Regulations promulgated under ERISA underscore the requirement that any spousal waiver of a QJSA form of benefit must occur *in advance* of the annuity starting date:

> The annuity starting date is . . . used to determine when a spouse may consent to and a participant may waive a QJSA. **A waiver is effective only if it is made . . . before the annuity starting date.**

Treas. Reg. Section 1.401(a)-20, Q&A-10(a) (emphasis added).

Section 8.1 of the Plan conforms to this requirement in that it provides that the period during which a participant may select an optional form of benefit (which requires written consent of spouse) begins not more than 90 days before a married participant may commence receipt of his retirement allowance, and ends on the date his benefits are to commence.

Thus, even if the language in Plaintiff's Marital Settlement Agreement could be interpreted as a valid waiver of Ms. Byrne's right to be the contingent participant of any death benefits payable under the Plan (which Defendant contends is not the case), Defendant cannot recognize the waiver because Plaintiff's benefits had already commenced.

The Treasury Regulations specifically contemplate this result, even wherein a participant is divorced subsequent to his or her annuity starting date:

> If a participant dies after the annuity starting date, **the spouse to whom the participant was**

> **married on the annuity starting date is entitled to the QJSA protection. The spouse is entitled to this protection (unless waived and consented to by such spouse) even if the participant and spouse are not married on the date of the participant's death,** except as provided in a [qualified domestic relations order].

Treas. Reg. Section 1.401(a)-20, Q&A-25(b)(3) (emphasis added). As underscored above, the Regulations clearly provide that the spouse to whom a participant is married on his annuity starting date is entitled to joint and survivor annuity protection even if a divorce subsequently occurs. While the Regulations do recognize that the spousal protection can be "waived and consented to" by the spouse, that waiver is effective **only if it is made before the annuity starting date or pursuant to a QDRO**, as provided in the Regulations cited *supra*. *See* Treas. Reg. Section 1.401(a)-20, Q&A-10.[6]

In *Boggs*, this Court recognized that the provisions of ERISA must be strictly construed. Thus, under *Boggs*, a plan participant cannot change his beneficiary designation unless (1) that participant designates a new contingent beneficiary in accordance with the applicable requirements of the plan prior to the commencement of benefits, or (2) he thereafter obtains a QDRO.

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6. It is undisputed that Plaintiff could have obtained a QDRO, but, for reasons never disclosed, he elected not to do so.

B. *Boggs* held that the anti-alienation provisions of ERISA prohibit the conferring of beneficiary status on non-plan participants except in certain circumstances.

This Court recognized in *Boggs* that the anti-alienation provisions of ERISA prohibit the conferring of beneficiary status under an ERISA plan on non-participants except in narrow circumstances, namely by way of a QJSA or a QDRO. *See Boggs*, 520 U.S. at 847 ("Apart from these detailed provisions, ERISA does not confer beneficiary status on non-participants by reason of their marital or dependent status."). The Court emphasized that the QJSA and the QDRO are the only exceptions to the anti-alienation provisions of ERISA, which provide that "each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1). According to *Boggs*, "ERISA's pension plan anti-alienation provision is mandatory and contains only two explicit exceptions, [the QJSA and QDRO], **which are not subject to judicial expansion.**" *Boggs*, 520 U.S. at 851 (emphasis added).

Thus, according to *Boggs*, non-QDRO state domestic relations orders (such as the divorce judgment in the instant case) cannot confer beneficiary status on a non-participant, no matter how clear the waiver language is in such order. In light of *Boggs*, the cases following the "majority rule" and holding that waivers in non-QDRO state domestic relations orders can confer beneficiary status on non-participants clearly were wrongly decided.

C. Under *Boggs* the "principle objective" of ERISA is to protect plan participants and beneficiaries

Boggs explicitly holds that the "principle object of [ERISA] is to protect plan participants and beneficiaries. *Id.* at 845. Therefore, any holding that would allow a non-participant/non-beneficiary, such as Plaintiff's Current Wife, to acquire an interest in benefits under a Plan other than by way of a QJSA would conflict with this "principle objective of ERISA."

CONCLUSION

Plaintiff's Petition for Writ of Certiorari should be denied because in *Boggs v. Boggs* this Court already settled the split among the circuits referenced in Plaintiff's Petition, and the Third Circuit properly followed *Boggs* in the case at bar.

Respectfully submitted,

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